Filed 7/13/09 In re A.C. CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re A.C., a Person Coming Under the Juvenile Court Law.	B211735 (Los Angeles County Super. Ct. No. CK 47092)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. TRACEY C., Defendant and Appellant.	

APPEAL from orders of the Superior Court of Los Angeles County, Donna Levin, Referee. Affirmed.

Sharon S. Rollo, under appointment by the Court of Appeal, for Defendant and Appellant.

Robert E. Kalunian, Acting County Counsel, James M. Owens, Assistant County Counsel, and Judith A. Luby, Deputy County Counsel, for Plaintiff and Respondent.

* * * * * *

Father, Tracey C., appeals from orders of the juvenile court denying his petition for modification under Welfare and Institutions Code section 388[1] and terminating parental rights in his daughter, A.C. We hold the court did not abuse its discretion in denying father's section 388 petition and any failure to comply with ICWA notice requirements would be harmless error because notice to the tribe was subsequently given, the tribe responded that A.C. is not eligible for tribal membership and the juvenile court has since found ICWA does not apply. We therefore affirm the court's orders.

FACTS AND PROCEDURAL HISTORY

A.C. was born while mother was incarcerated and was removed from parental custody at birth. A.C. was placed with maternal aunt M.W. in August 2006, when the infant was 10 days old. The Department filed a section 300 petition for A.C. that included allegations that father had seriously physically abused or neglected her sister, T.C., and their four half-siblings by another father.[2] (§ 300, subd. (j).) The court sustained the petition, and father was ordered to comply with anger management, parenting and individual counseling. The court granted father monitored visitation with A.C.

Father received 18 months of reunification services with A.C. He had a long history of serious abuse of children, compounded by a refusal to take responsibility for his actions or to admit his abusive behavior. Because father was in only partial compliance with the case plan, the juvenile court terminated reunification services for A.C. in May 2008 and set the matter for a section 366.26 permanency planning hearing.

---

[1] All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

[2] Mother is not a party to this appeal. All six of mother's children were declared dependents of the juvenile court. We previously affirmed the juvenile court's denial of father's section 388 petition and order terminating parental rights with respect to T.C. (*In re T.C.* (Aug. 8, 2008, B202846) [nonpub. opn.].) T.C. was placed with father's cousin, S.L. The four half-siblings were first placed with their paternal grandparents, and then with A.C. at M.W.'s home, where the five children remained at the time of the orders at issue.

Father filed a section 388 petition to reinstate reunification services, citing a change in circumstances. Father asserted he had completed two parenting programs and an anger management program with respect to T.C., and he was participating in individual counseling as to A.C. He contended he had no criminal record, maintained employment and a home, and did not abuse drugs. He indicated he had continued making significant progress in his treatment and visited his child as frequently as the Department permitted. He maintained he was attached to A.C., who called him "daddy." He asked for overnight and weekend visits with A.C., to begin immediately with the goal of having her live in his home within three months.

This court set the petition for modification to be heard on the same date as the section 366.26 permanency planning hearing.

In support of his section 388 petition for modification, father presented a letter from a family therapist stating father had a "miraculous" change in his attitude toward parenting and his child, and father needed an "opportunity to establish a relationship" with A.C. The therapist referred to father's "extreme frustration and deep depression" resulting from a claimed restriction of his visits purportedly due to either the inconvenience of the social worker or the caregiver's schedule. The therapist reported that father was "open to talking about anger, disappointment, frustration, and stress from the present as well as the past, and has been willing to learn coping strategies . . . ." (Italics added.)

For the section 366.26 permanency planning hearing, the Department reported that father had regular visits with two-year-old A.C. The child appeared to be happy to visit with father, and she ran to him when she saw him. A.C. was calm and relaxed in father's presence; she called him "daddy" when she met him and said "bye bye daddy" when she left. Father showed an interest in the child during visitation and expressed a wish to have more visits with her. Father informed the social worker he had tried to take parenting and anger management classes to comply with the court order but financial considerations prevented him from doing so.

The Department informed the juvenile court that M.W. wished to adopt A.C. as well as her four half-siblings. A.C. regarded M.W. as her primary caregiver, and they demonstrated a positive and nurturing attachment with each other. M.W. provided for A.C. with the support of strong cultural, community and church resources, and she regularly took A.C. to church on Sundays. A.C. was developing normally and continued to have close ties with her siblings. An adoptive home study had been completed for M.W., and the Department planned to move forward with adoptive placement for A.C. upon termination of parental rights.

The Department indicated it could not assess whether father had met any of his plan objectives, and the status of his compliance remained "[n]ot [d]eterminable."

Prior to the combined section 388 and permanency planning hearing, the adoption social worker informed the juvenile court the adoption division expected the child to be adopted should parental rights be terminated. The Department reported father had regular visits with the child and behaved appropriately and with affection during the visits. On the other hand, father stated he would not attend court ordered parenting classes or anger management programs unless the Department paid for them or they were provided for free. Father was attending individual counseling because the Department was paying the costs. He continued to maintain he had done nothing wrong regarding his children. Although he claimed he had a support system for care of the minor, no family or friends had come forward.

The juvenile court denied father's section 388 petition, finding his compliance was "too little . . . too late" and his circumstances were merely changing, not changed. The court found the best interest of the child would not be served by modification of the order terminating reunifications services for father. After denying father's petition, the court found there was clear and convincing evidence the child is adoptable and that it would be detrimental to the child to be returned to her parents. The court therefore terminated parental rights in the child.

This timely appeal followed.

DISCUSSION

1. Denial of Section 388 Petition

A determination whether new evidence or change of circumstances justifies a modification is a question committed to the juvenile court's sound discretion, and the trial court's decision will not be overturned on appeal unless an abuse of discretion is clearly established. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318 (*Stephanie M.*).) "'The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court.'" (*Walker v. Superior Court* (1991) 53 Cal.3d 257, 272, quoting *Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478-479.) The parent has the burden of showing changed circumstances by a preponderance of the evidence. (*Stephanie M.*, at p. 317; *In re Marilyn H.* (1993) 5 Cal.4th 295, 309-310 (*Marilyn H.*).)

After reunification services have been terminated, the juvenile court's focus shifts to the child's need for permanency and stability. (*In re Zacharia D.* (1993) 6 Cal.4th 435, 447; *Marilyn H., supra*, 5 Cal.4th at p. 309.) When, as here, a section 388 modification petition is filed after reunification services have been terminated and the section 366.26 permanency planning hearing has been set, the child's interest is paramount over the parent's interest in reunification. (*Stephanie M., supra*, 7 Cal.4th at p. 317; *Marilyn H.*, at p. 310.)

Father contends the section 388 petition was his opportunity to avoid the termination of his parental rights to A.C. (See *Marilyn H., supra*, 5 Cal.4th at p. 309.) Father asserts he addressed the allegations in the dependency petition through courses of parenting and anger management and through individual counseling. He argues he applied what he learned in his visits with his daughter and showed he has changed. Father admits A.C. has a bond with her caretaker M.W., but he asserts A.C. also has a bond with him. He points out that A.C. calls him "daddy," and she has demonstrated affection and pleasure in his company. He argues both bonds could be preserved by a gradual change in custody. Father contends his changed circumstances, the strong

parent-child bond between him and A.C., and the maintenance of A.C.'s connection to her sister T.C. and to her paternal relatives, all militated for the granting of his section 388 petition. He contends, therefore, that the juvenile court abused its discretion in denying his petition. We disagree.

Father's argument essentially requests us to reweigh the evidence and ignores the abuse of discretion standard of review that we employ in reviewing the juvenile court's order. Viewing the court's order for abuse of discretion, we cannot say the court exceeded the bounds of reason. There is ample evidence in the record that father's circumstances had not changed and that the best interests of the child would not be promoted by any modification of the order terminating reunification services.

A.C. was in the home of her aunt, together with four of her five siblings. She had lived in that home since she was 10 days old. Throughout that time, the only parent she knew was her prospective adoptive mother, and an adoption study had already been approved for that home. The child had a strong bond with her prospective adoptive mother. She and her half-siblings were flourishing in M.W.'s custody. In contrast, the record established father was not ready to take the child into his home. In the six months following termination of services, he had yet to comply with court orders to take anger management and parenting classes as to A.C., claiming he had already taken such courses with respect to her sister, T.C. Although father was partially compliant in taking individual counseling, the counselor at best could only indicate father was prepared to change and was changing, rather than that he had succeeded in changing. And, although father's monitored visitations with the minor indicated he had progressed to having positive interactions with the child, there was no showing termination of parental rights would be detrimental to A.C. if those contacts were to end.

Father claims the Department has not responded to his argument relating to A.C.'s best interests as they were affected by M.W.'s care of A.C.'s four half-siblings. But father's counsel raised this very issue in the juvenile court. During the section 388 hearing, father's counsel examined the case social worker and elicited from the worker that there were six children under the age of 13, including M.W.'s biological son, living

in A.C.'s proposed adoptive home. When counsel sought to pursue this line of questioning further, the court sustained a relevance objection, explaining, "it doesn't necessarily mean that if a child is in a home with five other children [he or she] is better or less better taken care of [than] where there is an only child. An only child can be abused or an only child can be sleeping on the floor. A child in the home can be part of a happy family and well taken care of and all [his or her] needs [are] being met even if they are sharing a room with somebody . . . ." The juvenile court was not persuaded by father's claim that M.W. could not give A.C. proper attention because of the demands of raising six children, and neither are we.

Father expresses concern that M.W. has or will cut off A.C.'s contact with T.C. and the paternal relatives, not just himself. Father claims it would be detrimental to A.C. to lose those relationships. However, M.W. has indicated she is willing for A.C. to maintain her relationship with T.C., father and the paternal relatives. A.C. thus would retain ties to T.C., father and the paternal family. These arguments too were presented to the juvenile court, which considered and rejected them.

Further, the disruption of an existing emotional bond with a caretaker is an important component in determining a section 388 motion. "[W]hen a child has been placed in foster care because of parental neglect or incapacity, after an extended period of foster care, it is within the court's discretion to decide that a child's interest in stability has come to outweigh the natural parent's interest in the care, custody and companionship of the child." (*In re Jasmon O.* (1994) 8 Cal.4th 398, 419, citing *Marilyn H., supra,* 5 Cal.4th at pp. 307-309.) Unlike *In re Kimberly F.* (1997) 56 Cal.App.4th 519, 529, on which father relies, we cannot say the child's best interests would be served by undoing the prior order. This is particularly so in this case, as father did not establish his circumstances have changed and demonstrated no closer bond with the child than that of a "friendly visitor." (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 576; see also *In re Aaliyah R.* (2006) 136 Cal.App.4th 437, 450.)

The juvenile court did not abuse its discretion in denying father's section 388 petition for modification.

2. Failure to Give ICWA Notice

At their arraignments, father denied any American Indian heritage but mother claimed to be a member of the Zuni tribe of New Mexico. The Department's counsel informed the juvenile court the Zuni tribe had been given notice as to A.C.'s siblings and a different judge had made a finding ICWA did not apply as to T.C. The court below, however, directed the Department to "do it again."

Father contends the Department failed to comply with ICWA notice requirements for A.C. despite being ordered to do so by the juvenile court. He asserts that because the court never made a finding that ICWA did not apply to the child the court's subsequent orders are voidable.

The Department implicitly acknowledged it failed to provide ICWA notice as to A.C. for the orders in issue when it requested that this court take additional evidence, speicifically a social worker's report attaching a letter from the Zuni tribe and an order of the juvenile court dated March 2009. This court granted that request. The additional evidence indicates the Department completed ICWA notice for A.C. to the Zuni tribe, and the tribe informed the Department by letter that A.C. does not qualify to become a member of the tribe. The minute order reflects the juvenile court has now made an express finding, based on the letter from the Zuni tribe, that the Department has complied with all requirements of ICWA and ICWA does not apply in this case.

As father concedes, a failure to comply with ICWA notice requirements renders court orders issued in absence of such notice merely *voidable*, not void. An appellate court may take additional evidence when a reversal and remand would serve no useful purpose and when the public policy favoring prompt resolution of dependency cases is served by considering such evidence. (See *In re Francisco W.* (2006) 139 Cal.App.4th 695, 704; accord *In re Terrance B.* (2006) 144 Cal.App.4th 965, 971.) These goals are satisfied when, as here, subsequent events, such as a tribe's notification the child is not eligible for tribal membership and the juvenile court's issuance of an order finding the child is not an Indian child, would render a reversal and remand an empty exercise. (*Francisco W., supra*, at pp. 705-706.) "If the only error requiring reversal of the

judgment terminating parental rights is defective ICWA notice and it is ultimately determined on remand that the child is not an Indian child, the matter ordinarily should end at that point, allowing the child to achieve stability and permanency in the least protracted fashion the law permits." (*Id.* at p. 708.) Several courts have considered postjudgment evidence in comparable circumstances. (*In re E.W.* (2009) 170 Cal.App.4th 396, 403, fn. 2 [record augmented by postjudgment letter from tribe indicating inability to establish children's Indian heritage]; *Alicia B. v. Superior Court* (2004) 116 Cal.App.4th 856, 866-867 [augmented record showed proper ICWA notices sent to tribes]; *In re Christopher I.* (2003) 106 Cal.App.4th 533, 562-563 [augmented record indicated no reason to believe child had Indian heritage]; but see *In re Justin S.* (2007) 150 Cal.App.4th 1426, 1432 [augmentation denied after appeal completed and remittitur already issued].)

The augmented evidence here establishes that any past failure of the Department to comply with ICWA notice requirements for A.C. cannot be prejudicial, as A.C. does not qualify for tribal membership. Any such error, therefore, is harmless and as such cannot justify a reversal of the court's order. (*People v. Watson* (1956) 46 Cal.2d 818, 835.)

DISPOSITION

The orders are affirmed.

FLIER, J.

We concur:

RUBIN, Acting P. J.

BENDIX, J.*

---

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.